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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

THE E. KAHN'S SONS COMPANY, an Ohio Corporation,
Petitioner,

v.

CHESTER BOWLES, Price Administrator, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS AND BRIEF IN SUPPORT THEREOF.

WILBUR LA ROE, JR.,
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Attorneys for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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CHESTER BOWLES, Price Administrator, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS AND BRIEF IN SUPPORT THEREOF.

To the Honorable, The Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, The E. Kahn's Sons Company, an Ohio corporation, respectfully prays that a writ of certiorari issue to review the judgment of the United States Emergency Court of Appeals entered in the above-entitled case March 29, 1945. On May 1, 1945, the Emergency Court of Appeals denied petitioner's petition for rehearing and motion for vacation of judgment.

Opinion Below.

The opinion of the Emergency Court of Appeals, not yet reported, appears in the record, p. ~~448~~ 446

Statute Involved.

The statute involved is the Emergency Price Control Act of 1942 as amended (50 App. U. S. C., 901, 902, 923, 924, 963), the pertinent provisions of which are printed in the appendix to this petition.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 204(d) of the Emergency Price Control Act of 1942 (50 App. U. S. C., Sec. 924(d)) and Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C., Sec. 347).

Statement.

On April 1, 1943, The E. Kahn's Sons Company filed with the Price Administrator its formal protest against the wholesale prices for fresh beef provided by Revised Maximum Price Regulation No. 169—Beef and Veal Carcasses and Wholesale Cuts, issued December 10, 1942.* The protest was denied on October 27, 1943, and a complaint was filed with the United States Emergency Court of Appeals on November 26, 1943, appealing from such denial. Upon leave granted by the Court, complainant filed with the Price Administrator additional evidence. The protest proceedings were thereupon reopened, the additional evidence received, and the protest was denied upon reconsideration April 24, 1944.

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* This regulation is sometimes hereinafter referred to as RMPR No. 169.

Following hearing, the Emergency Court rendered its opinion on March 29, 1945, and entered a judgment dismissing the complaint. On April 9, 1945, complainant petitioned the Court to grant rehearing and to vacate the judgment. The petition was denied by order dated May 1, 1945. In the Emergency Court petitioner's case, No. 103, was consolidated for hearing and disposition with No. 102. They had been considered on a common record by the Price Administrator and were considered on a common record by the Court. A separate order was entered in No. 103, however, dismissing that complaint while the complaint in No. 102, involving among other complainants two so-called non-processing cattle slaughterers, was not dismissed but is still pending on rehearing.

The Emergency Court sustained the validity of the maximum price regulation and dismissed petitioner's complaint on the following grounds:

1. That the prices on fresh beef are "generally fair and equitable" and allow "a generally fair and equitable margin" for processing, as required by the statute, if (a) "cattle operations as an entirety" yield as much as "out-of-pocket costs", and (b) the "over-all" earnings of the industry as a whole from all operations are above a normal peacetime level. This rule had been announced in *Armour and Company* v. *Bowles*, No. 101, decided the same day. "Out-of-pocket" costs were defined as including direct labor and materials but as excluding administrative and selling expenses.

2. That complainant had not made an accounting allocation to show that the yield of its "cattle operations as an entirety" were less than its "out-of-pocket" expense. "Cattle operations as an entirety" for the industry as a whole include the manufacture of leather, soap, canned meats, etc. which, while made by Armour and Company, are not made by the hundreds of typical and representative packers whose losses in producing fresh beef were demonstrated by complainant.

3. That complainant's evidence (based on the long-established and standard accounting method followed by the industry in determining the results of fresh beef operations), which showed that complainant and typical and representative packers throughout the industry were suffering heavy losses in producing fresh beef, should be rejected because the accounting method employed "is not an acceptable yardstick for determining whether the regulation establishes generally fair and equitable maximum prices." (Quotation from *Armour case.*)

The Emergency Price Control Act of 1942 authorizes the Price Administrator to establish and maintain only those prices which are "generally fair and equitable" (Sec. 2(a)), and by a special amendment, known as the McKellar amendment, requires that as to prices on products "resulting from the processing of agricultural commodities, including livestock, a generally fair and equitable margin shall be allowed for such processing." (Stabilization Act of 1944, Sec. 3.)

The primary question presented is whether prices for "cattle operations as an entirety" may be maintained below the cost of production and as low as the "out-of-pocket" expense because the industry as a whole from other and unrelated operations is obtaining sufficient profits to make its "over-all" earnings as much or more than were obtained in peacetime.

The second fundamental question presented is whether the maximum prices for a major product of the packing industry—fresh beef—may be fixed or maintained in disregard of the cost of producing fresh beef, and whether the Price Administrator may employ the profits from other cattle operations, not related to fresh beef operations, to offset losses on fresh beef under the maximum prices and thereby bring the returns of the "cattle operations as an entirety" up to "out-of-pocket" expense. It is complainant's position that the requirements of the statute have not been met by prices for major products which do not provide full cost plus a margin for processing; and that maximum

prices imposing losses on major products cannot be justified by "over-all" earnings or by profit margins on unrelated products.

A third fundamental question is whether the Price Administrator may employ the operations of a few large packing companies who engaged in many industries, including the manufacture of leather, soap, and canned goods, not engaged in by hundreds of typical and representative packers, in arriving at "generally fair and equitable" prices for fresh beef for the industry as a whole, or whether the prices on fresh beef must be "generally fair and equitable" considering the operations of the hundreds of independent packing companies.

A fourth fundamental question is whether the Price Administrator may maintain as to companies producing more than one product, known as multi-product companies, maximum prices on major products below the cost of production while for single-product companies a special subsidy is paid on such major products to compensate for such losses and to provide a margin for processing.

The protest and complaint of your petitioner against the fresh beef prices maintained by RMPR No. 169 was supported by evidence showing that petitioner and representative and typical packing companies throughout the industry were suffering heavy losses in the production of fresh beef. Employing the Price Admnistrator's calculations these losses were approximately $10 per head when cattle were purchased at ceiling prices and the companies could do no more than break even when cattle were purchased at the minimum prices permitted under the cattle-stabilization program. The losses by the typical and representative packer as shown by complainant's evidence were much higher, being $17 per head when cattle were purchased at ceiling prices and with a loss of approximately $7 per head even when cattle were purchased at minimum prices under the cattle-stabilization program. Petitioner's evidence consisted not only of figures showing its own operations and

losses but also of an affidavit prepared by the Accounting Committee of the National Independent Meat Packers Association showing losses under the maximum prices for fresh beef for typical and representative packers in all price zones throughout the United States. In the following table we show the losses as disclosed by petitioner's evidence in the territory in which petitioner's plant (Cincinnati—Zone 15) is located (R. ~~248-253~~ 250-255):

Loss Per Cwt., Beef Carcasses

	At Maximum Cattle Price	At Minimum Cattle Price
Grade AA—Choice	$2.89 loss	$1.25 loss
Grade A—Good	3.12 loss	1.40 loss
Grade B—Commercial	3.07 loss	1.29 loss
Grade C—Utility	3.00 loss	1.15 loss

The evidence shows similar losses for typical and representative packing companies located in all price zones throughout the United States.

The losses stated were arrived at by employing the long-established accounting method followed by the packing industry in determining the cost of producing fresh beef. This accounting method treats the operations of the beef department of a multi-product company as standing on its own basis in the same way as if it were a separate business. The method is known as the cut-out test method and the beef department is credited with the products produced by it in the same manner as though it were a separate enterprise. While the larger packing companies engage in substantial processing of the by-products of cattle slaughter, the typical and representative packing company does not. As to the typical and representative packing company, the cut-out test method actually reflects their "cattle operations as an entirety" except for the manufacture of sausage. Petitioner's evidence showed that in the typical and representative packing company the manufacture of sausage bears a negligible relation to the production of fresh beef.

Only a very small amount of material is obtained in the production of fresh beef which is used in the manufacture of sausage. The beef utilized in the manufacture of sausage is obtained from different and lower grades of cattle than those slaughtered for the purpose of producing fresh beef.* Petitioner's evidence also showed that it was impossible for the typical and representative packer to recover his fresh beef losses by any amount of profit on the small quantity of material obtained in the fresh beef operation and utilized in the manufacture of sausage.

The cut-out test method of cost determination employed by the industry was rejected by the Price Administrator on the ground that it failed to reflect profits from extensive by-product processing engaged in by the largest packing companies. Petitioner's evidence showed that such processing was not conducted by the typical and representative packer and that as to them, the standard accounting method reflected "their cattle operations as an entirety" except for the independent sausage operations having no material relation to fresh beef production. The Price Administrator and the Court below thus have rejected the long-established and standard accounting method followed by the industry although the Emergency Price Control Act (Sec. 2 (h)) provides:

> "The powers granted in this section shall not be used or *made to operate to compel changes in business prac-*

* That different grades of cattle are used for sausage manufacture than for fresh beef was recognized by the Court below in No. 96, *Armour Co.* v. *Bowles,* involving sales of fresh beef to the government. The Emergency Court in No. 96 found as a fact that the maximum prices had "substantially impeded" the production of fresh beef, saying:

> "It seems clear that the established maximum prices during the period now in question constituted a substantial impediment to the slaughtering of animals yielding carcasses of the grades required by the government contracts. With results so unfavorable in the better grades, the natural consequence was a greater concentration on the slaughter of the lower and less expensive grades yielding the type of meat found in sausage, hamburger, canned meats and other processed products."

tices, cost practices or methods, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act." (Italics supplied)

The Price Administrator recognized the standard accounting method, the cut-out test, as sound for that part of the industry engaged only in the production of fresh beef. The record shows that there are hundreds of such companies. (R. 323-324). In fact, the Administrator employed that method in having established for such single-product companies a special subsidy of 80 cents per cwt. on the weight of cattle slaughtered so that such companies might not suffer losses in producing fresh beef. The standard accounting method was rejected *only as to part of the industry*, namely, as to those companies which, in addition to producing fresh beef, also produce other products involving the processing of beef.* The real reason for the rejection by the Price Administrator of the standard accounting method is, therefore, not that it is unsound but that it determines the cost of producing fresh beef separately, whereas the Price Administrator rejects any determination of such costs and insists that all operations of the industry be considered in the aggregate and that any price, however low, is "generally fair and equitable" if "over-all" earnings of the industry as a whole from all operations equal or exceed the peacetime level.

The Emergency Court has modified the Price Administrator's position only slightly. It has sanctioned the mainte-

* It should be emphasized that fresh beef is the primary product of cattle slaughtering. The Price Administrator in his Statement of Considerations issued with the price regulations stated: "It is estimated that about 90% of beef is marketed as fresh meat, the remaining 10% consisting mostly of pickled, smoked, and canned products" (R. 166). When the typical animal is slaughtered the packer obtains the following products: a carcass to be sold fresh at a ceiling price of approximately $120; a hide with a value of $8.50; and other by-products with a value in the aggregate of less than $12.

nance of prices on a major product of the packing industry (having a value at ceiling prices of approximately one billion dollars annually) *at less than out-of-pocket cost* if "cattle operations in their entirety" yield as much in the aggregate as out-of-pocket costs on such operations and profits of the industry as a whole from unrelated operations are sufficient to provide an "over-all" profit equal to the peacetime level. In addition, the Court approved the use by the Administrator of the "cattle operations" of the few large packers as representative for the industry as a whole although such operations include manufacturing activities of other industries in which the hundreds of typical and representative packers do not engage, such as the manufacture of leather, soap, glue, and canned meats. In announcing and applying the rule in the *Armour case* the Court employed the operations of a single company, Armour and Company, which include these unrepresentative activities; but in its consideration of petitioner's complaint the Court failed to give effect or to consider petitioner's evidence that the cut-out accounting method does include "cattle operations in their entirety" as conducted by the typical and representative packer except for the manufacture of sausage which, while involving cattle of other grades not used in fresh beef production, bears no material relation to fresh beef production. Petitioner's evidence showed that in the case of its own operations the losses on fresh beef could not be overcome by its profits from sausage.

The Questions Presented.

The petition presents the following fundamental questions:

1. Are the maximum prices on fresh beef maintained by RMPR No. 169 "generally fair and equitable" and do they provide "a generally fair and equitable margin for . . . processing" when such maximum prices yield less than the out-of-pocket costs of production?

2. Are the maximum prices on fresh beef maintained by RMPR No. 169 "generally fair and equitable" and do they provide "a generally fair and equitable margin for . . . processing" when "cattle operations as an entirety" yield no more than out-of-pocket costs under the maximum prices?

3. Are the fresh beef prices maintained by RMPR No. 169 "generally fair and equitable" and do they provide "a generally fair and equitable margin for . . . processing" for the industry as a whole when measured by the "cattle operations" of a few large packers which include manufacturing operations utilizing the by-products of cattle slaughter which are not engaged in by the hundreds of independent packing companies?

4. May the Price Administrator refuse to determine the cost of producing fresh beef separately and maintain on fresh beef prices below cost, such losses to be made up from other operations unrelated to fresh beef production?

5. May the Price Administrator reject the long-established method of cost accounting established in the industry?

Reasons for Granting the Writ.

The decision of the Emergency Court of Appeals has approved a novel rule of law without precedent in the field of government regulation, namely, that private property may be required to be sold at less than the cost of production. It has announced this rule as applicable to price fixing under the Emergency Price Control Act which applies to the sale of all commodities sold within the United States. This extraordinary rule has been applied in the present case to maximum prices on one of the most important major products of the third most important industry in the nation, a product needed by every household in the land. The ruling should be reviewed by the Supreme Court, both because of its importance to the industry involved and also because the ruling is applicable to all prices fixed or maintained by the Price Administrator under the statute and sold by

industries producing more than one product. The ruling should also be reviewed because it has no precedent in American jurisprudence and is contrary to the whole body of law that governmental authority may not be so used as to appropriate private property without just compensation.

The Emergency Price Control Act requires that prices shall be "generally fair and equitable" and as to the "*products*" of livestock a special amendment requires that "a generally fair and equitable margin for . . . processing" shall be allowed. The Price Administrator with the approval of the Emergency Court has, we believe, asserted and exercised a power not granted, namely, the control of profits and the national economy, in disregard of the limitation of the Price Administrator's power to the fixing of generally fair and equitable *prices*. The grant of such sweeping economic power to the Price Administrator is of such great public importance that it should be confirmed in him only upon the clearest statutory authority and only after the most thorough consideration by the highest court of the Constitutional issues presented.

Wherefore the petitioner prays that a writ of certiorari issue to review the judgment of the United States Emergency Court of Appeals entered in this case March 29, 1945.

Respectfully submitted,

WILBUR LA ROE, JR.,
FREDERICK E. BROWN,
ARTHUR L. WINN, JR.,
Attorneys for Petitioner.

Dated: May 29, 1945.

IN THE

Supreme Court of the United States

October Term, 1945.

The E. Kahn's Sons Company, an Ohio Corporation, *Petitioner,*

v.

Chester Bowles, Price Administrator, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

Preliminary Statement.

The foregoing petition contains a summary statement of the case, as well as a citation of the opinion below, statement of grounds of jurisdiction, and citation of the statute involved.

The central question presented is whether the Price Administrator possesses the unprecedented power to compel the sale of major products of commerce at less than the cost of production. The Price Administrator and the Court below have inferred this extraordinary power from a statute which authorizes the Administrator merely to fix prices, contains no grant of power to appropriate private property or to levy either capital or income taxes, and, in

fact, limits the grant of price-fixing power by the requirement that such prices must be "generally fair and equitable" to the sellers. The commodity involved, fresh beef, is the primary product of cattle slaughter, and is a basic commodity in our national economy. The product is needed by every household. Cattle are slaughtered and fresh beef produced in almost every state. (R. 245) The Price Administrator has asserted the power to impose and maintain maximum prices on this major and basic commodity below the cost of production, *even below the out-of-pocket cost,* and the Emergency Court has approved, in the face of the general statutory requirement and a special statutory amendment specifically requiring that "*on products* resulting from the processing of agricultural commodities, *including livestock,* a generally fair and equitable *margin* shall be allowed for such processing." (Italics ours.) The asserted power finds no support in the language of the statute but is plainly contradicted by it; and at no place in the legislative history, either at the time of original enactment or subsequently, is there a suggestion that Congress intended, or the Price Administrator proposed, the maintenance of prices on any major and basic commodity in our national economy below the cost of production. Such a thought or proposal is in conflict with the general purpose of the statute to avoid "scarcities" of essential products and "to assist in securing adequate production of commodities." (Sec. 1 (a))

Specification of Errors.

The following are urged as the errors of the United States Emergency Court of Appeals:

1. The Court erred in not holding Revised Maximum Price Regulation No. 169 invalid as being arbitrary and capricious, not in accordance with law, and a violation of petitioner's rights under the Fifth Amendment to the Constitution.

2. The Court erred in holding the prices maintained by Revised Maximum Price Regulation No. 169 are "generally fair and equitable" as required by Section 2 (a) of the Emergency Price Control Act of 1942, as amended.

3. The Court erred in holding that the prices established by Revised Maximum Price Regulation No. 169 allow "a generally fair and equitable margin for . . . processing" as required by Section 3 of the Stabilization Act of 1942.

4. The Court erred in rejecting the standard accounting method established in the industry for determining the cost of producing fresh beef and in holding, in effect, that the cost of producing fresh beef is irrelevant to the determination of "generally fair and equitable" prices for fresh beef.

5. The Court erred in holding that where "over-all industry earnings are well above their normal peacetime level * * * the maximum prices in RMPR No. 169 must be deemed generally fair and equitable if they afford a sufficient margin to enable the industry generally to earn in its cattle operations as an entirety enough to cover its 'out-of-pocket' costs." (R. ~~449-450~~ 441 - 442.)

6. The Court erred in including in the "cattle operations as an entirety" for the industry as a whole the manufacturing operations of one large company involving cattle by-products when such manufacturing operations are not engaged in by the hundreds of typical and representative packing companies and are not representative of the industry as a whole.

7. The Court erred in considering all products containing any material obtained from the slaughter of cattle as a single product and in grouping with fresh beef production separate and independent operations.

8. The Court erred in failing to find that the cost of producing fresh beef in the typical and representative packing

plant and for the industry as a whole could fairly and properly be determined only by the established accounting method followed by the industry, and that fresh beef prices should be based on the cost of production so determined.

9. The Court erred in failing to find that petitioner had shown the prices in Revised Maximum Price Regulation No. 169 to be less than the cost of producing fresh beef by typical and representative packers in all price zones throughout the country.

10. The Court erred in defining "out-of-pocket" costs so as to exclude administrative and selling expenses.

ARGUMENT.

Revised Maximum Price Regulation No. 169 is invalid because the prices provided yield less than the cost of producing the products.

The prices established by RMPR No. 169 are for fresh beef in carcasses and wholesale cuts. The basic price is that provided for carcasses, the prices on the wholesale cuts made therefrom merely reflecting the fair differential in cost for the breaking of the carcasses into cuts. For this reason the Price Administrator in issuing the regulation and in considering the protests employed the basic carcass price throughout his discussions and the parties to the protest proceeding, as well as the Court below, have followed the same practice.

It should be emphasized at the outset that the Price Administrator has conceded throughout the proceedings that the industry has suffered losses in the production of fresh beef under the maximum prices. It was for this reason that he brought about the payment of a special subsidy of 80 cents per cwt. on the weight of cattle slaughtered to those producers who engage in no processing operations involv-

ing the use of carcass beef.* The position of the Price Administrator has simply been that such losses should be offset by profits from other operations, even from operations having no relation of any kind to fresh beef production or cattle operations. The Emergency Court has upheld the Price Administrator in disregarding losses on fresh beef and has ruled that, where over-all earnings of the industry as a whole from all operations are adequate, the losses on fresh beef are irrelevant so long as all cattle operations in their entirety yield as much as "out-of-pocket" expenses.

The justification advanced by the Price Administrator in his consideration of the protests, and by the Court below, for disregarding the industry's losses on fresh beef is the profits obtained by a few large packers from processing the by-products of cattle slaughter, namely, the manufacture of leather, soap, etc. This justification has no support in the operations of the hundreds of independent packing companies who constitute the bulk of the industry from the standpoint of numbers. Such companies do not engage in the processing operations conducted by the few big packing companies. The 16th Census of the United States covering the year 1939 found 1,478 wholesale meat packing establishments, including both slaughtering and non-slaughtering establishments. (*Manufactures, 1939—Meat Products*) Excluding the non-slaughtering establishments and those who slaughter cattle but do no processing, there remain hundreds of cattle slaughterers who do not receive the special subsidy of 80 cents per cwt. and who constitute the typical and representative packers subject to RMPR No. 169.

Petitioner's evidence (a) showed the character and scope of cattle operations of these typical and representa-

* Under the Directive of the Office of Economic Stabilization establishing this payment eligibility to receive the special payment is not based on the processing of by-products of cattle slaughter but on the sale of not less than 98 percent of the carcass production from all grades of cattle in carcasses or non-processed cuts. (8 F. R. 14641)

tive packing companies; (b) showed that the standard accounting method followed by the industry, the so-called cut-out test method, included the cattle operations of such companies in their entirety except for sausage manufacture; (c) showed that sausage manufacture has almost no relation to fresh beef production; and (d) that the maximum prices on fresh beef failed by wide margins to equal the costs of such companies in producing fresh beef. The calculations of the Price Administrator when applied to such companies showed a loss of $10 per head at ceiling cattle prices but the Emergency Court found that the Price Administator had underestimated the costs of slaughtering and handling fresh beef by $3 or $4 per head. Included in petitioner's evidence is the affidavit of the Accounting Committee of the National Independent Meat Packers Association and based on what that Committee deemed to be fair average expense and operating figures the losses suffered by such companies were approximately $17 per head when cattle were purchased at ceiling prices. At minimum cattle prices such companies were able to do no better than break even using the Administrator's own calculation and the subnormal expenses which he employed. On basis of the Accounting Committee's figures, the representative and typical packer suffered losses of $7 per head even when cattle were purchased at minimum prices.

The only "cattle operation" of the typical and representative packer not completely and fully reflected in the loss calculation by the Price Administrator and by the Association Accounting Committee is the manufacture of sausage. The major raw material in sausage is pork but some beef is mixed with the pork. However, the beef used in sausage manufacture is not obtained from fresh beef operations but from the slaughter of lower grades of cattle not suitable for fresh beef. (R. ~~236~~ 239) The only materials obtained from fresh beef operations and used in the manufacture of sausage are a few pounds, 15 to 20 pounds from a 1,000 pound steer, of trimmings or edible offal. (R. ~~237~~ 239) The

few cents of sausage profit which might be "allocated" or attributed to these few pounds of raw material could not possibly equal the loss of more than $10 suffered under the maximum prices on the carcass obtained from the 1,000 pound steer. (R. 237) Petitioner's profit from sausage manufacture is no more than 2 cents per pound. (R. 199) It might, therefore, allocate to each 1,000 pound steer 30 or 40 cents of sausage profit (for the 15 or 20 pounds of raw material) against a loss in slaughtering the animal for fresh beef of approximately $15.

Petitioner showed that its losses on fresh beef could not possibly be offset by any profits it obtains in the processing of beef or the manufacture of sausage. Its evidence shows that its profits from processed cuts and sausage amounted to only 8 cents per cwt. on its total cattle slaughter as compared with the 80 cents per cwt. special subsidy paid to non-processing cattle slaughterers to overcome their losses and provide some margin. Only a small fraction of petitioner's losses are offset by the processing profit of 8 cents per cwt. on the weight of cattle slaughtered. (R. 298-299)

The affidavit of the Association Accounting Committee showed that in the slaughtering of a steer to obtain fresh beef, the packer obtains the following products:

1,000 lb. Grade "A" Steer Yield

	Weight	Value
Carcass	550 lbs.	$118.25*
Hide	70 lbs.	$ 8.35**
Edible by-products (Hearts, liver, head and cheek meat, sweetbreads, tongue, tripe, brain, etc.)	37.3 lbs.	$ 5.71
Tallow	50 lbs.	$ 4.25
Dried blood and tankage	37 lbs.	$ 1.27

Note: Yields and values stated by Accounting Committee, National Independent Meat Packers Association. (R. 260)

175* Chicago Price, Grade A, Statement of Considerations. (R. 173)

** Value after curing. (R. 260)

The typical and representative packer processes these products only to the extent necessary to place them in a marketable condition. The values shown for the various products are the maximum which the packer can obtain for these products at OPA ceiling prices when they are placed in a marketable condition. When the Price Administrator or the Association Accounting Committee applies the industry's standard accounting method of determining the cost of producing fresh beef, known as the cut-out test method, all products resulting from slaughter are priced in a marketable condition. *The cut-out method shows a loss in fresh beef operations only when the cost of cattle and the expense of operations are greater than the total amount which can legally be obtained for all the products.*

Maximum prices below the cost of production of hundreds of typical and representative packers in every price zone throughout the country are obviously not "generally fair and equitable" to the industry as a whole and do not provide the "generally fair and equitable margin for . . . processing" required by the statute. In sustaining the maintenance of the fresh beef prices in spite of the losses on fresh beef the Price Admnistrator justified his course entirely by the processing operations of the few large packers because such companies handle approximately one-half of the total cattle slaughtered. On reopening the Price Administrator was presented with petitioner's evidence regarding the operations of the hundreds of typical and representative packing companies but he adhered to his policy of determining the legality of his prices based on the operations of the largest companies because of their great volume. However, the Price Administrator did not seek to controvert the evidence presented by petitioner as to the scope and character of cattle operations in the typical and representative slaughtering plant. In his opinion on reopening the Price Administrator was able to mention only seven companies whose operations included the extensive processing. (R. ~~338~~ 340) Such extensive processing was taken

by the Price Administrator as "representative" of the industry because it is more or less true of the handful of large companies who slaughter about one-half of the total cattle slaughtered. It is, we submit, arbitrary and unlawful for the Price Administrator to impose upon hundreds of companies prices for fresh beef which are below their costs of production because a few large companies are able to offset their losses on fresh beef with profits from manufacturing operations not conducted by the industry generally.

The Price Administrator places much emphasis upon the fact that Armour and Company suffered losses on fresh beef operations in certain years prior to price control. The Price Administrator went so far as to make certain calculations employing average market quotations for cattle and carcasses for the purpose of demonstrating that the industry generally suffered losses on fresh beef operations prior to price control. This conclusion was conclusively contradicted by the existence, growth and development of hundreds of non-processing cattle slaughterers located throughout the United States whose successful operation rested solely upon the profitable production and sale of fresh beef. In order to keep these companies from "going to the wall" the special subsidy of 80 cents was established. Petitioner's evidence also contradicted the Price Administrator's assumption by a showing that petitioner had prior to price control consistently made a profit from fresh beef operations (R. ~~300~~ 193) and the profits made from fresh beef operations prior to price control by other companies, located in the states of Iowa, Tennessee, Kentucky, Delaware, Pennsylvania, Ohio and Missouri were also included in petitioner's evidence. (R. ~~245~~ 147)

If statutory language employed by Congress is to be considered with decent regard for the meaning of words, we believe it is inescapable that power delegated to the Price Administrator to fix "prices" and limited by the requirement that such prices must be "generally fair and equita-

ble'' to the sellers does not authorize the maintenance of prices on a major product of the packing industry, a basic product in our national economy, below the full cost of production. To be ''generally fair and equitable'' the prices must include a margin of profit. This has been placed beyond doubt by the McKellar amendment unless it be said that an act of Congress amending the Price Control Act is meaningless. That amendment requires that in fixing maximum prices on ''*products* resulting from the processing of agricultural commodities, *including livestock,* a generally fair and equitable *margin* shall be allowed for such processing.'' (Italics ours.) The purpose of Congress in amending the statute to require a ''margin'' on the ''products'' resulting from the processing of ''livestock'' cannot lightly be declared to be meaningless. When administrators treat laws of Congress as meaningless, or courts so treat them, even in time of war, we have abandoned Constitutional government and a government of law.

We have demonstrated above the fairness and reasonableness of the industry's method of determining the cost of producing fresh beef, particularly for the typical and representative packer as to whom it fully reflects his total operation in the production of fresh beef. It is, therefore, unnecessary on the petition to argue further the error of the Price Administrator and his lack of authority to disregard the industry's established cost practice and method contrary to Section 2 (h) of the Price Control Act, as amended.

For the foregoing reasons we submit that the Emergency Court erred in the particulars stated in failing to invalidate the prices maintained by RMPR No. 169 and that the national importance of the serious questions presented, not only as to the hundreds of meat packing companies, but as to all producers and sellers of essential products subject to the administrative orders of the Price Administrator, war-

rants the thorough consideration of the case by this honorable Court.

Respectfully submitted,

WILBUR LA ROE, JR.,
FREDERICK E. BROWN,
ARTHUR L. WINN, JR.,
Attorneys for Petitioner.

Dated: May 29, 1945

APPENDIX.

Emergency Price Control Act of 1942 as Amended (50 App. U. S. C. 901, 902, 823, 924)

"SECTION 1. (a) It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. It shall be the policy of those departments and agencies of the Government dealing with wages (including the Department of Labor and its various bureaus, the War Department, the Navy Department, the War Production Board, the National Labor Relations Board, the National Mediation Board, the National War Labor Board, and others heretofore or hereafter created), within the limits of their authority and jurisdiction, to work toward a stabilization of prices, fair and equitable wages, and cost of production."

"SEC. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment

will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941: *Provided, That no such regulation or order shall contain any provision requiring the determination of costs otherwise than in accordance with established accounting methods.* Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. As used in the foregoing provisions of this subsection, the term 'regulation or order' means a regulation or order of general applicability and effect. Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order, and shall give consideration to their recommendations. In the case of any commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or both, consisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry, or of the

industry in such region as the case may be. The committee shall select a chairman from among its members, and shall meet at the call of the chairman. The Administrator shall from time to time, at the request of the committee, advise and consult with the committee with respect to the regulation or order, and with respect to the form thereof, and classifications, differentiations, and adjustments therein. The committee may make such recommendations to the Adminstrator as it deems advisable, and such recommendations shall be considered by the Administrator. Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, without regard to the foregoing provisions of this subsection, issue temporary regulations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection. (Amendment of 1944 italicized.)

* * * * * * *

"SEC. 2. (h) The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, or changes in established rental practices, except *where such action is affirmatively found by the Administrator to be necessary* to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act. (Amendment of 1944 italicized.)

* * * * * * *

SEC. 203. (a) Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections.

At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing or ninety days after the issuance of the regulation or order (or in the case of a price schedule, ninety days after the effective date thereof specified in section 206) in respect of which the protest is filed, whichever occurs later, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

(b) In the administration of this Act the Administrator may take official notice of economic data and other facts, including facts found by him as a result of action taken under section 202.

(c) Any proceedings under this section may be limited by the Administrator to the filing of affidavits, or other written evidence, and the filing of briefs.

Review

SEC. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a state-

ment setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided*, That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be oostponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases of which it has jurisdiction under this Act. The court may fix and establish a table of costs and fees to be approved by the Supreme Court of the United States, but the costs and fees so fixed shall not exceed with respect to any item the costs and fees charged in the Supreme Court of the United States. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have ex-

clusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act, authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

Stabilization Act of 1942. (Amending Emergency Price Control Act of 1942.) (50 App. U. S. C. 963.)

SEC. 3. No maximum price shall be stablished or maintained for any agricultural commodity under authority of this Act or otherwise below a price which will reflect to producers of agricultural commodities the higher of the following prices, as determined and published by the Secretary of Agriculture—

(1) The parity price for such commodity, (adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials) or, in case a comparable price has been determined for such commodity under and in accordance with the provisions of section 3 (b) of the Emergency Price Control Act of 1942, such comparable price (adjusted in the same manner), or

(2) The highest price received by such producers for such commodity between January 1, 1942, and September 15, 1942 (adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials), or, if the market for such commodity was inactive during the latter half of such period, a price for the commodity determined by the Secretary of Agriculture to be in line with the prices, during such period, of other agricultural commodities produced for the same general use;

and no maximum price shall be established or maintained under authority of this Act or otherwise for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to the producers of such agricultural commodity a price therefor equal to the higher of the prices specified in clauses (1) and (2) of this section: *Provided,* That the President may, without regard to the limitation contained in clause (2), adjust any such maximum price to the extent that he finds necessary to correct gross inequities; but nothing in this section shall be construed to permit the establishment in any case of a maximum price below a price which will reflect to the producers of any agricultural commodity the price therefor specified in clause (1) of this section: *Provided further,* That modifications shall be made in maximum prices established for any agricultural commodity and for commodities processed or manufactured in whole or substantial part from any agricultural commodity, under regulations to be prescribed by the President, in any case where it appears that such modification is necessary to increase the production of such commodity for war purposes, or where by reason of increased labor or other costs to the producers of such agricultural commodity incurred since January 1, 1941, the maximum prices so established will not reflect such increased costs: *Provided further, That in the fixing of maximum prices on products resulting from the processing of agricultural commodities, including livestock, a generally fair and equitable margin shall be allowed for such processing: Provided further,* That in fixing price maximums for agricultural commodities and for commodities processed or manufactured in whole or substantial part from any agricultural commodity, as provided for by this Act, adequate weighting shall be given to farm labor.

(The so-called McKellar amendment is italicized.)

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 99

THE E. KAHN'S SONS COMPANY, A CORPORATION,
PETITIONER

v.

CHESTER BOWLES, PRICE ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals appears at pages 440 to 447 of the Record. The opinion of that court in *Armour and Company* v. *Bowles,* No. 101, referred to in the opinion in the present case, is reported at 148 F. (2d) 529, certiorari denied June 4, 1945, No. 1220, 1944 term.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered March 29, 1945

(R. 448). Petitioner's petition for rehearing and motion for vacation of judgment were denied on May 1, 1945 (R. 468). The petition for a writ of certiorari was filed May 29, 1945. Jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, as amended, C. 26, 56 Stat. 23, 58 Stat. 643 (herein sometimes referred to as "the Act"), making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. 347).

QUESTIONS PRESENTED

(1) Whether petitioner established that the maximum prices for beef carcasses and wholesale cuts under Revised Maximum Price Regulation 169 fail to comply with the standards for maximum prices prescribed by the Emergency Price Control Act and the Stabilization Act of 1942.

(2) Whether the provisions of Section 2 (a) of the Emergency Price Control Act that maximum prices shall be "generally fair and equitable" and of Section 3 of the Stabilization Act of 1942 that they shall provide "a generally fair and equitable margin" for processing are satisfied, as applied to a multiple-product industry, if the industry's over-all earnings are in excess of those of a normal peacetime period, and if the industry obtains, with respect to the particular product or closely related group of products, the out-of-pocket costs involved in the production

of the product or group of products, exclusive of selling and general administration expenses.

(3) Whether it was arbitrary and unreasonable or otherwise not in accordance with law for the Price Administrator to refuse to accept the cut-out test method of determining beef costs as a measure of the adequacy of maximum prices for beef carcasses and wholesale cuts.

STATUTES AND REGULATION INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, and of the Stabilization Act of October 2, 1942, as amended (56 Stat. 765, 58 Stat. 643) are set forth in the Appendix, *infra,* pp. 11–18. Revised Maximum Price Regulation No. 169, Beef and Veal Carcasses and Wholesale Cuts, was issued December 10, 1942, effective December 16, 1942 (7 F. R. 10381). The present proceeding involves the general level of maximum prices established by the regulation for beef carcasses and wholesale cuts.

STATEMENT

Petitioner is a meat packer engaged, among other operations, in the slaughter of cattle and the sale of fresh beef carcasses and wholesale cuts (R. 4, 341). On April 1, 1943, petitioner filed a protest pursuant to section 203 (a) of the Act against the provisions of Revised Maximum Price Regulation No. 169—Beef and Veal Carcasses and Wholesale Cuts, issued December 10,

1942 (7 F. R. 10381). An opportunity to present additional evidence was furnished by an order of the Price Administrator issued on April 28, 1943 (R. 14). On July 21, 1943, petitioner filed a petition jointly with five other protestants requesting immediate decision of their protests (R. 17). By an order issued August 24, 1943 (R. 29), the Administrator consolidated those six protests with ten others, denied the petition for immediate decision and provided the protestants an opportunity to present evidence in rebuttal of that contained in and appended to the opinion accompanying the order (R. 32–79). That evidence included data as to the over-all profitability of the meat packing industry under the regulation, and data showing that the industry as a whole had historically incurred losses on fresh beef operations as measured by the so-called cut-out test method of establishing beef costs, upon which the protests were based. On September 2, 1943, petitioner filed, jointly with five other protestants (R. 20), a statement of views concerning the Administrator's order and opinion of August 24, 1943.

The Administrator on October 27, 1943 denied the consolidated protests to the extent that relief had not been granted by a Directive issued on October 26, 1943 by the Director of the Office of Economic Stabilization (8 F. R. 14641, R. 155) instituting a plan for the stabilization of cattle

prices and a differential subsidy for cattle slaughterers not engaged in any processing operations. The opinion accompanying the Administrator's order (R. 82–163) contained additional data on the profitability of the meat packing industry under the regulation and further evidence relating to the cut-out test method of determining beef costs. The order denying the protests authorized the protestants to request reopening and reconsideration. Within the time allowed for making such a request, petitioner filed its complaint in the Emergency Court of Appeals (R. 371) and, on January 25, 1944, requested leave of the court, pursuant to section 204 (a) of the Act, to submit additional evidence (R. 288).

The application was granted, and the Administrator on February 21, 1944, reopened the protest proceeding (R. 305) to receive the additional evidence filed by petitioner (R. 288–304), which incorporated by reference (R. 292) the extensive additional evidence submitted by five other protestants in the consolidated protest proceeding who had filed a joint complaint in the Emergency Court of Appeals. On April 24, 1944, the Administrator issued an order and opinion denying the six consolidated protests after consideration of the additional evidence presented (R. 327–370A). The two complaint proceedings were consolidated in the Emergency Court of Appeals (R. 441) and the Administrator filed on May 15, 1944, for both cases, a supplemental transcript of the

proceedings before him (R. 197). Some additional evidence was presented by the Administrator directly to the Court (R. 392). Judgment dismissing petitioner's complaint[1] was entered by the Court below on March 29, 1945 (R. 448). Petitioner's petition for rehearing (R. 449) was denied without opinion on May 1, 1945 (R. 468).

ARGUMENT

The petition for certiorari attacks the validity of Revised Maximum Price Regulation 169 on essentially the same grounds advanced in *Armour and Company* v. *Bowles,* No. 1220, 1944 Term, certiorari denied June 4, 1945. The cases were decided by the court below on the same day, and in the present case the court said (R. 441): "On the main point, the two consolidated cases now before us are governed by our decision in the *Armour* case." The present petition was filed prior to the denial of certiorari in the *Armour* case.

Certain additional contentions made by petitioner may be noted. With respect to the Ad-

[1] In the case with which petitioner's was consolidated, *Heinz et al.* v. *Bowles*, No. 102, decided March 29, 1945, the Emergency Court of Appeals set aside the regulation as applied to nonprocessing slaughterers on the ground that inadequate provision had been made for this special group in the industry. The judgment setting the regulation aside was vacated with consent of counsel for the purpose of receiving further evidence as to the actual operating experience of the nonprocessing slaughterers under the regulation and the special subsidy which they receive.

ministrator's rejection of the so-called cut-out test method of cost accounting, petitioner apparently argues that while the considerations leading to such rejection may be applicable to the very largest packers, they are not properly applicable to the numerous smaller packers of which petitioner claims to be representative. But there can be no dispute about the fact that petitioner does engage, to some degree at least, in the following operations, the returns from which are not reflected by the cut-out test, although they enhance the value of cattle: the manufacture of sausage; the fabrication of beef cuts for sale to purveyors of meals; grinding beef into hamburger; and curing and drying beef cuts (R. 4). The basic defects in the cut-out test therefore apply even in the case of the small packers.

Petitioners also argue that they proved that the small packers could not recover out-of-pocket costs on cattle operations. Under Section 204 (b) of the Act, the burden of establishing that a maximum price regulation is not in accordance with law, or is arbitrary or capricious, rests upon the complainant. *Montgomery Ward & Co.* v. *Bowles,* 138 F. (2d) 669 (E. C. A. 1943); *Cudahy Bros. Co.* v. *Bowles,* 142 F. (2d) 468 (E. C. A. 1944); *Gillespie-Rogers-Pyatt Co. Inc. et al.* v. *Bowles,* 144 F. (2d) 361 (E. C. A. 1944). In the present case petitioner's argument is wholly unsupported in the record by any actual operating results ad-

justed to reflect the additional returns allocable to beef from sausage manufacturing or whatever other processing operations are carried on by the small packers, although petitioner had been given ample opportunity in the protest proceeding to introduce such evidence (R. 305, 310–313). Moreover, petitioner's argument is based on the assumption that petitioner was representative of small packers generally in the extent of processing performed. This assumption was not accepted by the Administrator, as petitioner's brief might seem to suggest, but on the contrary was sharply contested.[2]

The court below held that (R. 441):

> On the main point, the two consolidated cases now before us are governed by our decision in the *Armour* case. In that case we upheld the Administrator's contention that the cut-out test method of cost accounting is not an acceptable criterion for determining whether RMPR 169 establishes generally fair and equitable maximum prices.

And further, that (R. 442):

> As the record stands, they [the present complainants] have failed to sustain the burden of proving their case under the *Gillespie* formula as applied by us in the *Armour* case.

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[2] See the Administrator's memorandum in opposition to the petition for rehearing below (R. 460, 463–466).

The issue here, however phrased by petitioner, is essentially one of factual determination, a task peculiarly within the competence of the Administrator, subject to judicial review by the Emergency Court of Appeals as to the reasonableness of his determination. Petitioner has fallen far short of showing any justification for further review of administrative findings of fact which have thus been sustained. *Commissioner* v. *Scottish American Co.*, 323 U. S. 119, 123; *Dobson* v. *Commissioner*, 320 U. S. 489.

It may not be inappropriate to note that petitioner made no showing that it was suffering hardship. On the contrary, the Administrator found that petitioner was earning substantial profits (R. 344, note 17), and that the earnings of small packers generally were in excess of those of peacetime years (R. 121, 126, 152, 370, 415). Moreover, the Administrator has recognized, and the court below held in the companion *Heinz* case (R. 443–444), that even where a regulation is generally fair and equitable, some provision must be made, consistently with effective administration of the stabilization program, to protect against loss

> a whole group of producers constituting an important segment of the industry who, because of the nature of their operations, have a common economic situation that sets them apart from the rest of the industry.

The decision below, therefore, cannot be construed as threatening the existence of any class in the industry such as the class of which petitioner contends it is a representative member.

CONCLUSION

The decision below is right and does not warrant review. The petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

RICHARD H. FIELD,
General Counsel,
Office of Price Administration.

JUNE 1945.

APPENDIX

Pertinent provisions of the Emergency Price Control Act of 1942, as amended, and the Stabilization Act of 1942, as amended.

Emergency Price Control Act of 1942, 56 Stat. 23, as amended June 30, 1944.

SEC. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may

determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941: *Provided,* That no such regulation or order shall contain any provision requiring the determination of costs otherwise than in accordance with established accounting methods. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. As used in the foregoing provisions of this subsection, the term "regulation or order" means a regulation or order of general applicability and effect. Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order, and shall give consideration to their recommendations. In the case of any commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or both, consisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case may be. The committee shall

select a chairman from among its members, and shall meet at the call of the chairman. The Administrator shall from time to time, at the request of the committee, advise and consult with the committee with respect to the regulation or order, and with respect to the form thereof, and classifications, differentiations, and adjustments therein. The committee may make such recommendations to the Administrator as it deems advisable, and such recommendations shall be considered by the Administrator. Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, without regard to the foregoing provisions of this subsection, issue temporary regulations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection.

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SEC. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file

with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided,* That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the

Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

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(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency

Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

Stabilization Act of 1942, 56 Stat. 765, as amended June 30, 1944:

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SEC. 3. No maximum price shall be established or maintained for any agricultural commodity under authority of this Act or otherwise below a price which will reflect to producers of agricultural commodities the higher of the following prices, as determined and published by the Secretary of Agriculture—

(1) The parity price for such commodity (adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials) or, in case a comparable price has been determined for such commodity under and in accordance with the provisions of section 3 (b) of the Emergency Price Control Act of 1942, such comparable price (adjusted in the same manner), or

(2) The highest price received by such producers for such commodity between January 1, 1942, and September 15, 1942 (adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials), or, if the market for such commodity was inactive during the latter half of such period, a price for the commodity determined by the Secretary of Agriculture to be in line with the prices, during such period, of other agricultural commodities produced for the same general use;

and no maximum price shall be established or maintained under authority of this Act or otherwise for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to the producers of such agricultural commodity a price therefor equal to the higher of the prices specified in clauses (1) and (2) of this section: *Provided,* That the President *shall,* without regard to the limitation contained in clause (2), adjust any such maximum price to the extent that he finds necessary to correct gross inequities; but nothing in this section shall be construed to permit the establishment in any case of a maximum price below a price which will reflect to the producers of any agricultural commodity the price therefor specified in clause (1) of this section: *Provided further,* That modifications shall be made in maximum prices established for any agricultural commodity and for commodities processed or manufactured in whole or substantial part from any agricultural commodity, under regulations to be prescribed by the President, in any case where it appears that such modification is necessary to in-

crease the production of such commodity for war purposes, or where by reason of increased labor or other costs to the producers of such agricultural commodity incurred since January 1, 1941, the maximum prices so established will not reflect such increased costs: *Provided further,* That in the fixing of maximum prices on products resulting from the processing of agricultural commodities, including livestock, a generally fair and equitable margin shall be allowed for such processing: *Provided further,* That in fixing price maximums for agricultural commodities and for commodities processed or manufactured in whole or substantial part from any agricultural commodity, as provided for by this Act, adequate weighting shall be given to farm labor.

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